Joo Leong Timber Merchant v Dr Jaswant Singh a/l Jagat Singh

HIGH COURT (MUAR) — CIVIL APPEAL NO 12–14 OF 1998
JEFFREY TAN J
30 NOVEMBER 2002

Contract *— Building Contract — Agreement to construct a house — Delay in completion — Claim for loss of rental — Whether trial court should have considered s 75 of the Contracts Act 1950 — Whether claim should have been made for liquidated and ascertained damages — Whether claim for loss of rental has been proved*

Contract *— Building Contract — Damages — Damages to be awarded — Duty to mitigate — Whether failure to mitigate damages must be pleaded*

This was an appeal by the appellant against the decision of the sessions court ('the trial court'), dismissing the appellant's claim for RM31,700, it being allegedly the balance sum due and payable by the respondent to the appellant in respect of building works executed and materials supplied by the appellant towards the erection of a single storey bungalow for the respondent, and allowing the respondent's counterclaim for RM63,000, it being allegedly the respondent's costs of remedial works, and the respondent's counterclaim for RM300 per month from 15 August 1985 to 22 October 1998, it being allegedly the respondent's loss of rental income for the period 15 August 1985 to 22 October 1998 allegedly occasioned by the appellant's failure to complete the said single storey bungalow within the contractual period. With regard to the appeal on the claim, it was agreed that the outcome would be determined by a single finding, based on the appeal record, as to whether, one KC Ooi was or was not the architect for the proposed bungalow.

Held, allowing the appeal:

(1) The trial court had not considered s 75 of the Contracts Act 1950 ('the Act'). On the facts of the case, cl 22 of the building agreement providing that the sum of RM25 for each day's delay payable by the appellant as 'liquidated and ascertained damages', was unquestionably a clause falling within s 75 of the Act. The respondent must prove alleged damages suffered. The trial court did not appreciate that. The respondent had not proved the loss of rental for the period between 15 August 1985 to 22 October 1998. That failure to prove damage should have resulted in the refusal of the trial court to award compensation in the sum of RM300 per month for the period of 15 August 1985 to 22 October 1998. The trial court fell into error by not refusing the compensation as claimed (see pp 122G, 123G–124B); *Penang Port Commission v Kanawagi s/o Seperumaniam* [1996] 3 MLJ 427 followed.

(2) The respondent had not shown that he had taken any steps to mitigate his damage. The conduct of the respondent by not

bringing the alleged loss of rental income to an end, in relation to his duty to mitigate was not reasonable. An innocent party can recover no greater damages for breach of contract that the loss he would have sustained had he acted reasonably to avoid or reduce loss. In Malaysia, there is no legal authority which states that the failure to mitigate damages must be pleaded (see p 125B–C, H); *Techno Land Improvement Ltd v British Leyland (UK) Ltd* [1979] EGD 519 followed.

(3) It might be so that KC Ooi had not expressly stated that he was the architect. But KC Ooi had clearly conducted himself as the architect. The certificate of payment might have had been for a collateral purpose to obtain a bank loan. But it remains that only the architect could have issued the certificate of payment, and KC Ooi would not have issued the certificate if he had not accepted the appointment. And by issuing the certificate of payment, which was a deliberate act, KC Ooi had conducted himself as the architect, who was entitled to issue the certificate (see p 126G–I).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap keputusan mahkamah sesyen ('mahkamah perbicaraan') yang menolak tuntutan perayu untuk jumlah RM31,700, yang dikatakan sebagai baki jumlah tertunggak dan perlu dibayar oleh responden kepada perayu bagi kerja-kerja pembinaan yang telah dilakukan dan bahan-bahan binaan yang telah dibekalkan oleh perayu untuk tujuan pembinaan sebuah banglo satu tingkat responden, dan membenarkan tuntutan balas responden untuk jumlah RM63,000, yang dikatakan sebagai kos responden melakukan kerja-kerja pemulihan, dan tuntutan balas responden untuk RM300 sebulan dari 15 Ogos 1985 hingga 22 Oktober 1998, yang dikatakan sebagai kerugian pendapatan sewa bagi tempoh 15 Ogos 1985 hingga 22 Oktober 1998 yang disebabkan oleh kegagalan perayu untuk menyiapkan banglo setingkat tersebut mengikut tempoh yang dijanjikan. Untuk rayuan bagi tuntutan tersebut, adalah telah dipersetujui bahawa keputusan akan ditentukan dengan hanya satu penemuan yang berdasarkan kepada rekod rayuan, bahawa sama ada seorang KC Ooi adalah arkitek bagi pembinaan banglo tersebut.

Diputuskan:

(1) Mahkamah perbicaraan telah tidak menimbangkan s 75 Akta Kontrak 1950 ('Akta tersebut'). Dari fakta-fakta kes, kl 22 perjanjian pembinaan tersebut memperuntukkan bahawa perayu perlu membayar jumlah RM25 untuk setiap hari kelewatan sebagai 'liquidated and ascertained damages', yang mana tanpa ragu-ragu adalah satu klausa yang termasuk di dalam lingkungan s 75 Akta tersebut. Responden perlulah membuktikan kerugian

yang dikatakannya. Mahkamah perbicaraan tidak mengambil kira perkara tersebut. Responden tidak membuktikan kerugian sewa bagi tempoh 15 Ogos 1985 hingga 22 Oktober 1998. Kegagalan untuk membuktikan kerugian tersebut sepatutnya akan menyebabkan mahkamah perbicaraan enggan untuk memberi award bagi pampasan berjumlah RM300 sebulan untuk tempoh 15 Ogos 1985 hingga 22 Oktober 1998. Mahkamah perbicaraan telah khilaf kerana tidak menolak pampasan seperti yang dituntut (lihat ms 122G, 123G–124B); *Penang Port Commission v Kanawagi s/o Seperumaniam* [1996] 3 MLJ 427 diikut.

(2) Responden tidak menunjukkan bahawa beliau telah mengambil tindakan untuk mengurangkan kerugian yang di alaminya. Perbuatan responden yang tidak mengambil tindakan untuk menghentikan kerugian bagi pendapatan sewanya, berhubung dengan tanggungjawab beliau untuk mengurangkan kerugiannya, adalah tidak wajar. Pihak yang tidak bersalah boleh mendapat gantirugi yang tidak lebih daripada gantirugi bagi kemungkiran perjanjian yang akan ditanggungnya sekiranya beliau telah mengambil tindakan yang sewajarnya bagi mengelak atau mengurangkan kerugian tersebut. Di Malaysia, tidak terdapat autoriti undang-undang yang mengatakan bahawa kegagalan untuk mengurangkan kerugian mesti diplidkan (lihat ms 125B–C, H); *Techno Land Improvement Ltd v British Leyland (UK) Ltd* [1979] EGD 519 diikut.

(3) Memang berkemungkinan bahawa KC Ooi tidak mengatakan yang beliau adalah arkitek tersebut. Tetapi KC Ooi telah dengan jelas bertindak sebagai arkitek. Sijil pembayaran tersebut telah mungkin digunakan dengan tujuan mendapatkan pinjaman bank. Tetapi hanya arkitek sahaja yang boleh mengeluarkan sijil pembayaran tersebut dan KC Ooi tidak akan mengeluarkan sijil tersebut jika beliau tidak menerima perlantikan sebagai arkitek. Dan dengan mengeluarkan sijil pembayaran tersebut, yang mana adalah satu perbuatan yang sengaja, KC Ooi telah bertindak sebagai arkitek, yang mana beliau dibenarkan untuk mengeluarkan sijil tersebut (lihat ms 126G–I).]

Notes

For cases on damages awarded in building contracts, see 3 Mallal's Digest (4th Ed, 2000 Reissue) paras 2141–2143.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)

Anderson v Benson Court of Appeal (Civil Division) 11 July 1991 (refd)

Boyo v Lambeth London Borough Council [1994] ICR 727 (refd)

British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Company of London Ltd [1912] AC 673 (refd)
Chik binti Abdullah v Itam binti Saad [1974] 1 MLJ 221 (refd)
Goldburg v Shell Oil Co of Australia Ltd 95 ALR 711 (refd)
Geest v Lansiquot [2002] 1 WLR 3111 (refd)
Hadley v Baxendale(1854) 9 Exch 341 (refd)
Hopkins v Norcross plc [1993] 1 All ER 565 (refd)
Khushvinder Singh Chopra v Mookka Pillai Rajagopal & Ors [1999] 1 SLR 589 (refd)
Kleinwort Benson Ltd v Birmingham City Council [1996] 4 All ER 733 (refd)
Maredelanto Compania Naviera SA v Bergbau-Handel GmbH; 'The Mihalis Angelos' [1970] 3 WLR 601 (refd)
Penang Port Commission v Kanawagi s/o Seperumaniam [1996] 3 MLJ 427 (folld)
Reliance Shipping & Travel Agencies v Low Ban Siong [1996] 2 MLJ 543 (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (refd)
T & S Contractors Ltd v Architectural Design Associated QBD (Official Referee's Business) 16 October 1992 (refd)
Techno Land Improvement Ltd v British Leyland (UK) Ltd [1979] EGD 519 (folld)
Wearne Brothers (M) Ltd v Jackson [1966] 2 MLJ 155 (refd)
West v Versil Ltd & Ors Court of Appeal (Civil Division), The Times, 31 August 1996 (refd)
Westwood v Secretary of State for Employment [1985] AC 20 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (refd)

Legislation referred to

Contracts Act 1950 s 75
Supreme Court Rules [Eng] O 18 rr 12(1)(c), 13(4)

Appeal from: Civil Suit No 52(62)–63 of 1998 (Sessions Court, Batu Pahat)

KS Dass (*K Sila Dass & Partners*) for the appellant.
CC Aiyathurai (*CC Aiyathurai & Co*) for the respondent.

Jeffrey Tan J: This is an appeal by the appellant/plaintiff against the decision of the Batu Pahat Sessions Court, dismissing with costs the appellant's claim for RM31,700, it being allegedly the balance sum due and payable by the respondent to the appellant in respect of building works executed and materials supplied by the appellant towards the erection of a single storey bungalow for the respondent, and allowing with costs the respondent's counterclaim for RM63,000, it being allegedly the respondent's costs of remedial works, and the respondent's counterclaim for RM300 per month from 15 August 1985 to 22 October 1998, it being

allegedly the respondent's loss of rental income for the period 15 August 1985 to 22 October 1998 allegedly occasioned by the appellant's failure to complete the said single storey bungalow within the contractual period, together with interests at the rate of 8% per annum from 15 August 1985. A

According to Mr KS Das for the appellant, the trial court held that the appellant must prove that one KC Ooi was the architect of the proposed bungalow, and that the trial court was entirely wrong to have taken that issue to determine the claim, as whether KC Ooi was the architect was not a pleaded issue. Mr CC Aiyathurai for the respondent did not respond to that contention but suggested instead that the appeal on the claim be determined by a finding by this court, based on the appeal record, as to whether KC Ooi was the architect for the proposed bungalow. Mr Aiyathurai said, 'If the finding, based on the appeal record, is that KC Ooi was the architect and entitled to issue the certificate [of payment — P8), then ... the claim should be allowed. On the other hand, if the finding is otherwise, the appeal on the claim should be dismissed'. And in a snap, that suggestion was accepted by Mr Das. Hence with regard to the appeal on the claim, it was agreed that the outcome would be determined by a single finding by this court, based on the appeal record, as to whether KC Ooi was or was not the architect for the proposed bungalow. B C D

But with regard to the appeal on the counterclaim, both learned counsel said that both parties would be free to advance all argument to attack or defend the trial court's judgment. E

Nonetheless, there was consensus in this court, that there were indeed works executed not according to approved plan (D4(A–D) and D5(A–D)). As a matter of fact, SP3, a consulting engineer, testified in the court below that he inspected the work and found that the level of the master bedroom was 30 inches lower than the level in the approved plan, that the levels of the ground beam and dining hall were lower than the levels in the approved plan, and that the level of the rooms was six inches off the level in the approved plan (see pp 52, 53 and 58 of the appeal record ('the AR')). Not surprising therefore, it was readily conceded by Mr Das that 'there were works executed not in accordance with the plans'. But Mr Das contended that the floor levels and size of the beams were varied at the specific request of the respondent. F G

Indeed, it was the testimony of SP3 in the court below, that the respondent had confirmed to him that he (respondent) had authorized those variations to the approved plan (see pp 53 and 55 of the AR), and it was the testimony of the appellant in the court below that 'Dr Jaswant asked for a variation not in the RC plan' (see p 34 of the AR) and that the respondent agreed to the level of the master bedroom being 'two feet above normal' (see p 40 of the AR). Anyway, it could be said straightaway, that it was not pleaded by the appellant that such works executed not in accordance with the approved plan were so executed at the request of and/or approved by the respondent. It was specifically pleaded by the respondent (see para 5 of his defence and counterclaim) that the ground beams of the master bedroom were constructed at the wrong levels, and H I

A that the construction of the bungalow was 'carried out ... in complete disregard and at variance to the architectural, structural and engineering drawings'. The alleged 'defective works' were particularized in para 5 of the defence and counterclaim. But all that was pleaded by the appellant, in his short reply to the defence and counterclaim, was that 'he delivered a house according to the architectural and engineering drawings and duly B certified by the architect'. The appellant refuted the alleged defective works and required the respondent to strictly prove the alleged defective works. But it was not pleaded by the appellant that such works executed not in accordance with the approved plan were so executed at the request and/or with the approval of the respondent, an omission in the pleading C that did not escape Mr Aiyathurai who submitted that it was not pleaded that the respondent had varied the approved plans and that all evidence adduced in connection with that non-pleaded issue should not have been admitted.

It is settled law, that parties are bound by their pleadings (see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152), and that non-pleaded issues D should not be heard (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794). There lies the importance of pleadings. A case in point is *Chik binti Abdullah v Itam binti Saad* [1974] 1 MLJ 221, where the Federal Court held that since it was not pleaded it was too late to raise the argument that the agreement had been E entered into by the defendant in her personal capacity. There are countless other authorities on the function of pleadings, but an authoritative commentary of what is the law can be found in *Halsbury's Laws of Malaysia* Vol 1 para 10.3.129, which reads as follows:

> The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to F determine the matters in dispute between the parties. Thus, a party is bound by his pleadings and his case is confined to the issues raised in the pleadings unless and until they are amended. A plaintiff who at the trial radically departs from his case as pleaded, however, is likely to fail. It follows that the pleadings enable the parties to decide in advance of the trial which evidence will be needed. From the pleadings, the appropriate method of trial can be G determined. They also form a record which will be available if the issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at their close.

No issue was raised in the pleadings in the instant case that such works so executed not in accordance with the approved plan were so executed at the H request and/or with the approval of the respondent. No notice was given in the pleadings, that the appellant would raise that issue. And since it was not pleaded, it could not be argued, be it here or below, that such works so executed not in accordance with the approved plan were so executed at the request and/or with the approval of the respondent (*Chik binti Abdullah v Itam binti Saad* followed). The only pleaded issue that concerned the I counterclaim, was whether the work executed was in accordance with approved plans. And that issue could only have been settled by the trial court in favor of the respondent, for both engineering report ('P16')

produced by the appellant and testimony of SP3 who pertinently was a witness for the appellant, affirmed that the levels of the floors and ground beams were not in accordance with the levels in the approved plans. Here it was admitted by Mr Das, that 'there were works executed not in accordance with the plans'. Then the appellant could not have 'delivered a house according to the architectural and engineering drawings and duly certified by the architect'. Hence, the trial court's finding that the respondent had proved that work was executed not in accordance with approved plans, supported by the evidence from both sides, could not be disturbed. Indeed, it was the only proper finding that could have been reached.

According to the testimony in the court below of DW3, the professional engineer who prepared the report (D24 — see pp 221–238 of the AR) on 'the civil/structural shortcomings, mistakes, inadequacies, and/or non compliance with the relevant architectural and civil/structural drawings, remedial works would cost RM63,000 (see pp 87 and 227 of the AR). And that testimony and report of DW3 on the costs of remedial works were not challenged by the appellant who had not adduced any opposing evidence on the costs of remedial works, a point also conceded by Mr Das. Hence, the trial court had only one set of evidence on the costs of remedial works to formulate its award. Then the trial court who had only one set of evidence to formulate its award, and unchallenged evidence at that, was only right to award RM63,000 towards remedial works, as the trial court without any opposing evidence had no evidential support to award anything less than RM63,000 towards remedial works, a fact that was appreciated by the trial court who decried that SP3's report had 'failed to quantify the remedial works or in any way to refute the observation in D24' (see p 162 of the AR). Hence, given the body of evidence, the award of RM63,000 towards remedial works was the only award that could have been made in the circumstances.

But it is rather difficult to endorse the trial court's award of RM300 per month for the period 15 August 1985 (the due date of completion) to 22 October 1998. First, the trial court had not given a single reason to justify the compensation of RM300 per month and for that lengthy period.

Secondly, the trial court had not considered s 75 of the Contracts Act 1950. When a contract has been broken, and if a sum is named in the contract as the amount to be paid in case of such breach, s 75 of the Contracts Act 1950 states:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

The effect of s 75 was clearly enunciated in *Wearne Brothers (M) Ltd v Jackson* [1966] 2 MLJ 155 per Abdul Aziz J at p 155 of the holdings, as follows:

whether the clause in the agreement was a penalty clause or not was irrelevant in view of s 75 of the Contracts (Malay States) Ordinance 1950 which provides that in every case the court must determine what is the reasonable compensation. The effect of the section is that the plaintiff is disentitled from recovering simpliciter the sum fixed in the contract whether as penalty or liquidated damages and must prove the damages suffered by him unless the sum named is a genuine pre-estimate.

The effect of s 75 was further enunciated in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, where it was held by the then Federal Court per Peh Swee Chin FCJ that in every case the court must determine what is the reasonable compensation, that despite the words 'whether or not actual damage or loss is proved to have been caused thereby' a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the principle in *Hadley v Baxendale* (1854) 9 Exch 341 and that failure to prove such damages will result in the refusal of the court to award such damages, that the words 'whether or not actual damage or loss is proved to have been caused thereby' shall only apply where the court finds it difficult to assess damages for the actual damages, and that where the words 'whether or not actual damage or loss is proved to have been caused thereby' apply, the damages shall not in any event exceed the sum so named in the contractual provision, and also in *Reliance Shipping & Travel Agencies v Low Ban Siong* [1996] 2 MLJ 543, where it was held by the Court of Appeal that the words 'whether or not actual damage or loss is proved to have been caused thereby' are limited to those cases where the court would find it difficult to assess damages for the actual damages or loss, that a clause in an agreement falling within s 75 of the Contracts Act 1950 must be subject to the court's determination that such agreed damages is reasonable compensation for the injured party, that damages allegedly suffered must be proved, and that the measure of damages stated in an agreement is enforceable provided that there is proof of the loss or damages limited to the extent of the quantum of the agreed compensation.

The instant cl 22 of the agreement ('D18') providing that the sum of RM25 for each day's delay payable by the appellant as 'liquidated and ascertained damages' (see p 219 of the AR), was unquestionably a clause falling within s 75. But that was overlooked by the trial court. Alleged damages suffered must be proved by the respondent. That was not appreciated by the trial court, who adopted the quantum claimed, albeit with a deduction of RM60 per month that in the event was not explained by the trial court, as the true measure of damage without the respondent proving any loss. Yes, the respondent had not proved the loss of rental for the period between 15 August 1985 to 22 October 1998. The only 'evidence' on the loss of rental income was a solitary unavailing statement by the respondent that, 'I have counterclaimed RM360' (see p 100 of the AR), which was not any evidence tending towards any proof of any loss of rental income for the period 15 August 1985 to 22 October 1998. That failure to prove damage should have resulted in the refusal of the trial court

to award compensation in the sum of RM300 per month for the period of 15 August 1985 to 22 October 1998. 'Damages are not awarded simply because the plaintiff has thrown them at the head of the court. The loss must be shown to have been actually occurred and also be recoverable in law before the award can be made' (*Penang Port Commission v Kanawagi s/o Seperumaniam* [1996] 3 MLJ 427 at p 435 per Mahadev Shankar JCA). With respect, the trial court fell into error by not refusing the compensation as claimed.

That is not however to say that the trial court should not award any compensation. There was undoubted delay and there should be compensation, even if nominal. The trial court should have determined the reasonable compensation. But what could have been the reasonable compensation in the instant case? There was evidential material for such an assessment before the trial court. To begin with, the contractual period for completion of all works was eight and a half months (see p 219 of the AR). If construction of the entire bungalow could be completed within eight and a half months, then remedial work or reconstruction should not reasonably take more than eight and a half months. The respondent would have to engage a new contractor who would have to mobilize workmen, equipment, and materials. There would be a passage of time before any actual remedial work could begin. A period of six months should be sufficient for the respondent to engage a new contractor and for the new contractor to mobilize workmen, equipment, and materials. The appellant discontinued all work in December 1985 (see p 241 of the AR) or in early 1986 (see p 245 of the AR). The respondent through another contractor could have resumed work in December 1985 or in early 1986. And if the respondent had resumed work in December 1985 or in early 1986, then the bungalow could have been completed within 14½ months from December 1985 or early 1986, ie by April 1987, give or take a month or two. Given the evidential material before the trial court, the reasonable compensation could have been a sum approximating RM360 x 20 months (delay from 15 August 1985 to April 1987). But the alleged loss of rental income for the period from May 1987 to 22 October 1998 was not proved by the respondent, and it was not right to award any compensation for that period.

It was also not right to award compensation for the period after May 1987 for a further reason. Damages are assessed on the basis that an aggrieved party has a duty to mitigate his damages (*West v Versil Ltd & Ors* Court of Appeal (Civil Division), The Times, 31 August 1996; *Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733). A claim for damages is subject to a duty to mitigate the loss (*Westwood v Secretary of State for Employment* [1985] AC 20; *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH; 'The Mihalis Angelos'* [1970] 3 WLR 601; *Boyo v Lambeth London Borough Council* [1994] ICR 727; *Hopkins v Norcross plc* [1993] 1 All ER 565), and the right to damages is qualified by a duty to mitigate (*T & S Contractors Ltd v Architectural Design Associated* QBD (Official Referee's Business) 16 October 1992). A victim of a breach of contract cannot cut short his duty to mitigate his loss by the mere

commencement of an action for damages (see *Techno Land Improvements Ltd v British Leyland (UK) Ltd* [1979] EGD 519). Commercial good sense pointed not towards the deferment of remedial or reconstruction works but to the resumption of work upon cessation of work by the appellant (see *Khushvinder Singh Chopra v Mookka Pillai Rajagopal & Ors* [1999] 1 SLR 589 at p 598). Early completion of remedial or reconstruction work would have brought the alleged loss of rental income to an end (see *British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Company of London Ltd* [1912] AC 673). But the respondent had not shown that he had taken any steps to mitigate his damage. Suffice to say that the conduct of the respondent by not bringing the alleged loss of rental income to an end, in relation to his duty to mitigate was not reasonable. And 'it is well settled that innocent party can recover no greater damages for breach of contract than the loss he would have sustained had he acted reasonably to avoid or reduce loss' (*Techno Land Improvement Ltd v British Leyland (UK) Ltd* [1979] EGD 519 per Goulding J).

Mr Aiyathurai submitted that the issue of mitigation of damages 'should be pleaded' (counsel tendered the case of *Goldburg v Shell Oil Co of Australia Ltd* 95 ALR 711 as authority for his proposition) but was not pleaded by the appellant, and that the appellant had not adduced any evidence to show how damages could have been mitigated. With respect, *Goldberg v Shell* was just an action where mitigation of damages was pleaded but is not any authority that the issue of mitigation of damages should be pleaded by the appellant. Under O 18 r 12(1)(c) to be read together with r 13(4) of the former English Supreme Court Rules, it was 'incumbent upon the defendant, in order to be more informative about his defence to state the grounds on which he intends to contest the amount of damages by giving particulars of all the facts on which he relies to support any such ground as, for example, in mitigation of or otherwise in relation to, the amount of damages. The burden is cast upon the defendant to plead and prove the facts he relies on to support any positive case to contest the amount of damages claimed. In accordance with its policy of openness in pleading, the rule is expressed in general terms, so that the rule will apply to a plea in mitigation, not only in defamation actions but to all classes of actions, whether in contract or tort; and the rule will also apply to any ground on which it is open to the defendant to contest the amount of damages' (English Supreme Court Practice 1997 para 18/12/6). Perhaps it is a duty in England to plead the failure to mitigate damages (see *Geest v Lansiquot* [2002] 1 WLR 3111; *Anderson v Benson* Court of Appeal (Civil Division) 11 July 1991). But in Malaysia, there is no such O 18 r 12(1)(c) or corresponding rule in the Rules of the High Court 1980, and there is no legal authority which states that the failure to mitigate damages must be pleaded. As far as is known, there is no such rule that the failure to mitigate damages must be pleaded.

As for the finding — 'whether KC Ooi was the architect and entitled to issue the certificate of payment' — specifically requested by both parties, the Appeal Record discloses the following:

(1) The preamble to the agreement between the appellant and respondent stated that KC Ooi Associates was the architect (see p 200 of the AR) and clause 30 of the agreement provided that 'at the period of interim certificate ... the architect [meaning KC Ooi Associates] shall issue a certificate stating the amount due to the contractor from the employer' (see p 215 of the AR); A

(2) SP3 testified that KC Ooi 'came into the picture sometime in late Oct 1985. The original architect and engineer had been terminated' (see p 53 of the AR), that the respondent had asked him to get a new architect ... and he asked KC Ooi to assist' (see p 53 of the AR), that the appointment of KC Ooi was done verbally (see p 55 of the AR), that the respondent's letter dated 5 November 1985 was the letter appointing KC Ooi Associates (see p 60 of the AR); B C

(3) KC Ooi testified that he was asked 'to come into the project to certify the construction value in order to secure the bank's release of payment' and that he entered the project in good faith (see p 43 of the AR), that he had no appointment letter (see p 44 of the AR), that 'if I was retained I would have prepared the drawings for the remedial works' (see p 46 of the AR), and that he 'stepped in with the expectation of appointment' (see p 47 of the AR); D

(4) In his solicitors' letter dated 31 July 1986 to the Lembaga Arkitek Malaysia, KC Ooi stated that he had entered the project in utmost good faith and at the request of the respondent (see p 174 of the AR); E

(5) The respondent testified that he did not issue the letter appointing KC Ooi Associates 'as KC Ooi was already on record as the architect' (see p 100 of the AR), that he accepted KC Ooi as the architect (see p 94 of the AR); F

(6) In his letter dated 5 November 1985 to the Yang DiPertua Majlis Daerah Batu Pahat, the respondent informed the local authority that KC Ooi Associates was his architect (see p 171 of the AR);

(7) In his letter dated 13 May 1986 to KC Ooi Associates, the respondent stated that KC Ooi was the architect and held himself as a client of KC Ooi Associates (see p 178 of the AR); G

Mr Aiyathurai conceded that the respondent had 'accepted Ooi as the architect', but contended that in actual fact there was no architect as 'KC Ooi did not say that he was the architect'. It might be so that KC Ooi had not expressly stated that he was the architect. But KC Ooi had clearly conducted himself as the architect. The certificate of payment might have had been for a collateral purpose to obtain a bank loan. But it remains that only the architect could have issued the certificate of payment, and KC Ooi would not have issued the certificate if he had not accepted the appointment. And by issuing the certificate of payment, which was a deliberate act, KC Ooi had conducted himself as the architect, who was entitled to issue the certificate. The issue could only be answered in favor of the appellant. H I

A For the reasons above, this appeal is allowed, but subject to the following orders; (i) the respondent is to pay to the appellant the sum of RM31,700 together with interest at the rate of 8% per annum from 1 November 1985 to date of satisfaction; (ii) the appellant is to pay to the respondent the sum of RM63,000 towards the costs of remedial works, and the sum of RM7,200 towards loss of rental income from 15 August 1985 to B April 1987, both awards carrying interest at the rate of 8% per annum, the rate ordered by the trial court; (iii) costs below to be apportioned; (iv) all orders by the trial court, unless affirmed, are hereby set aside; and (v) no orders as to costs in this appeal.

Appeal allowed.

C

Reported by Peter Ling

D

E

F

G

H

I